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IN THE COURT OF CRIMINAL APPEALS

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OF THE STATE OF TEXAS

Craig Doyal, Appellee

v.

The State of Texas

Appeal from Montgomery County

* * * * *

STATE'S PROSECUTING ATTORNEY'S POST-SUBMISSION BRIEF AS AMICUS CURIAE

* * * * *

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Oral argument revealed three misconceptions or questions that could have been more fully addressed had time not been a constraint. First, there appears to be some confusion between an overbreadth challenge and traditional scrutiny review, as the former does not require consideration of whether a statute is "content-based." Second, if that determination becomes relevant, having to examine content to apply the statute is not enough to trigger strict scrutiny. Third, the overly broad language of the holding of *Reed v. Town of Gilbert, Ariz.*,[1] did nothing to overrule the cases underpinning that conclusion.

I. Overbreadth is not "scrutiny" analysis.

Appellee has framed his argument as one of the statute's overbreadth. His written and oral argument, however, incorporates and combines elements of strict scrutiny analysis. Although both are tests for facial constitutionality, they are distinct

[1] 135 S. Ct. 2218 (2015).

and should be treated as such.

Writing for the majority in *R.A.V. v. St. Paul*, Justice Scalia contrasted "the contention that the ordinance was 'overbroad' in the sense of restricting more speech than the Constitution permits, even in its application to him, because it is content based[,]" from "a technical 'overbreadth' claim – *i.e.*, a claim that the ordinance violated the rights of too many third parties."[2] The former, describing scrutiny analysis, is a question of fit meant to limit suppression of viewpoints. On the other hand, overbreadth analysis reveals whether a statute, however narrowly tailored, still restricts far more speakers than it should. Where scrutiny analysis focuses on method, overbreadth focuses on the results in practice: assuming the government drafted the statute as carefully as required to serve its substantial or compelling interest, does it still go too far?

Relevant here, the overbreadth doctrine does not operate differently if the statute is "content-based." A reviewing court merely discerns the sweep of the statute and determines whether the "strong medicine" is warranted. As a result, there are no presumptions of unconstitutionality or shifting of burdens if a statute is "content-based"—the burden to prove overbreadth rests on the challenger in all cases.[3]

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[2] 505 U.S. 377, 381 n.3 (1992).

[3] *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016) ("The person challenging the statute must demonstrate from its text and from actual fact 'that a substantial number of instances exist in which the Law cannot be applied constitutionally.'") (quoting *New York State Club Ass'n*

(continued...)

Finally, and perhaps most importantly, treating the two doctrines as flipsides of the same coin does a disservice to defendants. Unlike a traditional facial challenge, the overbreadth doctrine allows one to stand in the shoes of a chilled third party despite having committed an act that is clearly proscribable.[4] This is a boon to defendants. The chance for success under the overbreadth doctrine is limited by design but it is higher than zero. And it is the best chance many defendants have.

Appellee's confusion is understandable given this Court's treatment of the issues in *Ex parte Lo*[5] and because a statute that is not narrowly tailored will cover more protected speakers than it needs to. It may be that a statute that fails strict scrutiny will usually fail overbreadth analysis. But, as this Court appears to have recognized post-*Ex parte Lo*, it is important to distinguish them.[6]

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[3](...continued)
v. City of New York, 487 U.S. 1, 14 (1988)).

[4] *State v. Johnson*, 475 S.W.3d 860, 864-65 (Tex. Crim. App. 2015) ("[U]nder the First Amendment's 'overbreadth' doctrine, a law may be declared unconstitutional on its face, even if it may have some legitimate application and even if the parties before the court were not engaged in activity protected by the First Amendment.").

[5] 424 S.W.3d 10 (Tex. Crim. App. 2013) (orig. op.). In *Ex parte Lo*, this Court struck part of the online solicitation statute. Although the opinion began by purporting to apply strict scrutiny's presumption of invalidity that inheres to content-based regulations of speech and concluded that the statute is not narrowly drawn to serve a compelling interest, its internal analysis relies heavily on "technical" overbreadth cases like *Virginia v. Hicks*, 539 U.S. 113 (2003), *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and the classic *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). *Ex parte Lo*, 424 S.W.3d at 14, 18-24.

[6] *See Ex parte Thompson*, 442 S.W.3d 325, 349 (Tex. Crim. App. 2014) (relying on *R.A.V.* to question whether, having found a statute to be an invalid content-based restriction, it needed to address overbreadth).

II. "Content-based" can be a misleading descriptor.

At least two Judges suggested by their questions at argument that the statute is content-based because it plainly applies only to a certain type of speech. This is the prevailing view in this Court,[7] but it is wrong. Given the procedural and substantive consequences that come with the conclusion that a statute is content-based,[8] it is important that this Court get it right. The Supreme Court's jurisprudence makes clear that having to consider the content of speech before applying a law is not enough to make a statute content-based.

In *Reed*, the Supreme Court discussed at length the characteristics of a content-based regulation. The recurring themes are that the speaker has a message to convey or idea to discuss and that the government acts to suppress that message or idea:

- "Government regulation of speech is content based if a law applies to particular speech *because of the topic discussed or the idea or message expressed*."[9]

- "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its

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[7] *Id*. at 345 ("'If it is necessary to look at the content of the speech in question to decide if the speaker violated the law, then the regulation is content-based.'") (quoting *Ex parte Lo*, 424 S.W.3d at 15 n.12 (orig. op.)).

[8] *Reed*, 135 S. Ct. at 2226 ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

[9] *Id*. at 2227 (emphasis added).

face' draws distinctions *based on the message a speaker conveys*."[10]

- "[D]istinctions drawn *based on the message a speaker conveys* . . . are subject to strict scrutiny."[11]

- "[L]aws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government *because of disagreement with the message* [*the speech*] *conveys* . . . must also satisfy strict scrutiny."[12]

- "[A] speech regulation is content based if the law applies to particular speech because of the *topic discussed* or *the idea or message expressed*."[13]

This focus jibes with cases going back almost 30 years.[14] And the Court reaffirmed this approach this year: "Content-based regulations 'target speech based on its communicative content.'"[15]

Does this literally mean that regulation of any speech that communicates anything is subject to strict scrutiny? No. Cases show that words like "ideas,"

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[10] *Id*. (emphasis added).

[11] *Id*. (emphasis added).

[12] *Id*. (emphasis added) (bracketed material in original) (internal quotations and citations omitted).

[13] *Id*. (emphasis added).

[14] *See*, *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

[15] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed*, 135 S. Ct. at 2226).

"views," and "messages" are references to the open discussion of what the Supreme Court calls "matters of public concern." "It is speech on 'matters of public concern' that is at the heart of the First Amendment's protection[,]"[16] and the right to publicly criticize the stewardship of public officials its "central meaning."[17] Although "the boundaries of the public concern test are not well defined," the Supreme Court has articulated some guiding principles:

> Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.[18]

"The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery."[19] "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."[20] The First Amendment "'was fashioned to assure unfettered interchange of ideas for

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[16] *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758-59 (1985) (internal citations omitted).

[17] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273-75 (1964).

[18] *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (internal citations and quotations omitted).

[19] *Connick v. Myers*, 461 U.S. 138, 145 (1983).

[20] *Garrison v. State of La.*, 379 U.S. 64, 74-75 (1964).

the bringing about of political and social changes desired by the people.'"[21] Statutes that do not threaten this purpose do not merit strict scrutiny.

There are at least two strains of Supreme Court jurisprudence showing that a statute is not subject to strict scrutiny merely because it regulates based on content. The first, which arises when protected speech is incidentally restricted, was covered in the State's brief.[22] The second arises when a statute regulates speech on the same basis that makes it less protected than public speech on matters of public concern.

If the government can regulate a certain category of speech because it is unprotected by the First Amendment, it can discriminate within that category without triggering strict scrutiny. As the Supreme Court explained in *R.A.V.*:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.[23]

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[21] *Sullivan*, 376 U.S. at 269 (quoting *Roth*, 354 U.S. at 484).

[22] Appellant's Amended Br. at 18-19, 41-42, 51. *See City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986). The "secondary effects" doctrine was further developed in *Boos v. Barry*, 485 U.S. 312 (1988) (plurality), *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997), and *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

[23] *R.A.V.*, 505 U.S. at 388.

So long as the government does not interject a matter of public concern into its regulation, consideration of content does not make the statute "content-based."[24]

The Supreme Court went further with this argument, making it applicable to speech that, like commercial speech, receives protection under the First Amendment but does not deserve the protection of strict scrutiny.[25] Thus, the government may regulate price advertising in one industry but not in others because the perceived risk of fraud in the former is greater, but it may not prohibit only that commercial advertising that depicts men in a demeaning fashion.[26]

In each of these examples, the fact that content has to be reviewed to determine whether the statute is applicable is not the problem—it is the norm. And it does not trigger strict scrutiny until there appears to be viewpoint discrimination on a matter of public concern. The premise underlying both the Judges' questions and this Court's statement in *Thompson*, *i.e.*, a regulation is content-based if it is necessary to look at the content of speech to decide if the speaker violated the law, is thus incorrect.

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[24] For example, the government may prohibit only that obscenity which is "the most patently offensive *in its prurience* -- *i.e.*, that which involves the most lascivious displays of sexual activity," but it may not prohibit only that obscenity which includes offensive political messages. *Id*. (emphasis in original). And it may criminalize only those threats of violence directed against the President, but it may not criminalize only those threats against the President that mention his policy on aid to inner cities. *Id*.

[25] *Id.* at 388-89.

[26] *Id.*

III. *Reed*'s holding is complicated but has not changed this law.

Presiding Judge Keller asked whether *Reed* has effected a change in the law. Given her authorship of *Thompson*, it is not clear the State and Presiding Judge Keller agree on the state of the law prior to *Reed*. But it is clear that *Reed*'s application contrasts starkly with its repeated representation of the test for content-based statutes detailed above. It is also clear that *Reed* has not explicitly overruled the secondary effects doctrine or the Supreme Court's holding in *R.A.V.*

Despite the seeming clarity with which the Court in *Reed* defined what it means to be "content-based," it held that the Town of Gilbert's Sign Code merited strict scrutiny because it based its disparate treatment of signs on categories such as "ideological signs," "political signs," and "temporary directional signs relating to a qualifying event," the latter of which included religious assembly.[27] The majority called this "a paradigmatic example of content-based discrimination[,]"[28] but one could easily conceive of a more direct restriction on content and viewpoint.

The unfortunate result is an opinion that was written more broadly than was necessary to decide the case. The Court could have declined to determine the applicability of strict scrutiny because, as Justice Kagan put it, the town's defense of its ordinance "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh

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[27] *Reed*, 135 S. Ct. at 2224-25.

[28] *Id*. at 2230.

test."[29] But the Court did not restrain itself. *Reed*'s hard stance, even if taken with the best of intentions, thus conflicts with its summary of the law and the case law discussed above without mentioning the latter.

The concurring opinions, however, did address the conflicting authority. Taken together, six justices identified the application of strict scrutiny with the suppression of matters of public concern. Justice Alito, speaking for three justices who joined the majority, said that content-based laws merit strict scrutiny because "[s]uch regulations may interfere with democratic self-government and the search for truth."[30] Justice Kagan, speaking for another three, would also focus on how the First Amendment serves to keep "the marketplace of ideas . . . free and open" by preventing "an attempt to give one side of a debatable public question an advantage in expressing its views to the people."[31] "When that is realistically possible—when the restriction raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace—we insist that the law pass the most demanding constitutional test."[32] But, she concluded, when that threat is not realistically possible, clinging to strict scrutiny any time content is implicated is

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[29] *Id*. at 2239 (Kagan, J., concurring).

[30] *Id*. at 2233 (Alito, J., concurring).

[31] *Id*. at 2237-38 (Kagan, J., concurring) (citations and quotations omitted).

[32] *Id*. at 2238 (citations and quotations omitted).

unnecessary: "We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate [the First Amendment']s intended function."[33]

Justice Breyer joined Justice Kagan's concurrence, but added his own thoughts. "[C]ontent discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny."[34] Although a "mechanical" triggering of strict scrutiny is simpler, considering whether the policies underlying the First Amendment are actually served by it in a given case "permit[s] the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators."[35]

If Presiding Judge Keller was asking whether *Reed*, taken as a whole, forces this Court to abandon *Thompson*'s statement that a statute is content-based merely because it requires looking at the content of speech, the answer is "yes." But not because *Reed* announced a new rule. The Supreme Court has repeatedly shown that deciding whether a statute is content-based is not as easy as asking whether its application necessarily refers to "the content of speech," however broadly that term

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[33] *Id*.

[34] *Id*. at 2234 (Breyer, J., concurring) (emphasis in original).

[35] *Id*. at 2236.

is defined. A court should instead ask whether the core purpose of the First Amendment would be served by reversing the presumption of constitutionality and requiring the government to satisfy the highest level of scrutiny.

IV. Conclusion

The purpose of the Texas Open Meetings Act (TOMA) is to regulate the time, place, and manner in which governmental bodies perform their official business by requiring an open meeting. It is essentially a contemporaneous disclosure statute. The Act's reference to government business is unavoidable, as is the fact that government business is conducted with words. But that makes TOMA no different in principle than any of the hypothetical statutes discussed in *R.A.V.* What matters more than "what" is being regulated is "why" and "how."

The statute regulates speech on matters of public concern: "public business or public policy over which the governmental body has supervision or control," and "formal action" thereon.[36] But "public business" is just that; it is not the private speech of the body's members.[37] Hiding it from the public goes against the primary purpose of the First Amendment. Moreover, TOMA does not work to suppress any viewpoint. The Legislature cares only that these matters, however viewed or decided,

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[36] TEX. GOV'T CODE § 551.001(4)(A) (defining "meeting," the central term in the statute Appellee is accused of conspiring to circumvent, § 551.144).

[37] This is true regardless of the inapplicability of the "unprotected government speech" theory established in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to criminal prosecutions. *See Perry*, 483 S.W.3d at 911.

be discussed where the people have an opportunity to see it. There is no reason to force the State to satisfy strict scrutiny before it can promote transparency in government.

Finally, the statute satisfies even the intermediate-scrutiny test for time, place, and manner restrictions, which goes beyond the standard intermediate-scrutiny test.[38] "Preservation of the individual's confidence in government" is an "interest[] of the highest importance."[39] The statute satisfies "narrow tailoring" because that interest "would be achieved less effectively absent [TOMA]."[40] It does not matter that a less-restrictive means of accomplishing that goal could be imagined.[41] And the "ample alternative channels of communication" prong is easily met because TOMA increases the amount of communication to the public rather than restricts it. To view it otherwise would be to recognize the right of elected officials to hide from the people what they claim to be doing on their behalf.

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[38] *Ward*, 491 U.S. at 791 ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.") (quotations and citations omitted).

[39] *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978); *see also Natl. Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 14 (D.C. Cir. 2009) ("Transparency in government, no less than transparency in choosing our government, remains a vital national interest in a democracy.").

[40] *Ward*, 491 U.S. at 799.

[41] *Id*. at 791 ("The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.") (citations and internal quotations omitted, alteration in original).

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of October, 2018, a true and correct copy of the State's Post-Submission Brief as Amicus Curiae has been eFiled or e-mailed to the following:

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